No. 76-1581

In the Supreme Court of the United States

OCTOBER TERM, 1977

ABRAHAM E. FREEDMAN, PETITIONER

v.

HONORABLE A. LEON HIGGINBOTHAM, JR.,
JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A27-A71) is reported at 552 F. 2d 498. The findings and orders of the district court (Pet. App. A3-A26) are reported at 73 F.R.D. 544 and 551.

JURISDICTION

The judgment of the court of appeals (Pet. App. A72-A73) was entered on February 7, 1977. A petition for rehearing was denied on March 14, 1977 (Pet. App. A74). The petition for a writ of certiorari was not filed until May 12, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an attorney may properly be held in criminal contempt for continuing to pursue a course of conduct he believes to be in his client's interest, in defiance of repeated orders of the district court to cease.

STATEMENT

Petitioner, an attorney, was sentenced to 30 days' imprisonment and fined $500 for two episodes of contempt during a bench trial. See Fed. R. Crim. P. 42(a). Both contempt citations were based upon petitioner's failure to obey direct orders of the district judge during a lengthy civil trial.[1]

1. The first instance of contempt occurred on September 28, 1976. Petitioner was cross-examining Bennett O. Stalvey, Jr., a witness for the plaintiffs who had executed an affidavit that was appended to plaintiffs' complaint (Pet. App. A30). Petitioner began to read verbatim extensive portions of Stalvey's pretrial deposition, which allegedly contradicted a statement in the affidavit (Pet. App. A31). After petitioner had read 16 questions and 16 answers from the deposition without pausing to address the witness on the stand, opposing counsel objected. He argued that no inconsistency had been shown and moved that "any reading exercises be stopped" (*ibid.*). The trial judge asked petitioner whether he had any specific inconsistency to call to the witness's attention and inquired how much more petitioner intended to read. Petitioner responded "[a] couple more" (*ibid.*).

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[1]The trial began on January 19, 1976, and is still in progress. The plaintiffs contend that the defendants, including Local 542 of the International Union of Operating Engineers (represented by petitioner), discriminated against the plaintiff class on the basis of race and illegally denied them employment opportunities. See Pet. App. A30.

Petitioner proceeded to read five more questions and answers without asking the witness a question. The court interrupted petitioner and told him that the pending objection to continued reading of the deposition had been sustained (*ibid.*). Noting that "it is impossible to focus on a multi-phase series of questions" (*ibid.*) on cross-examination, the court told petitioner that he would permit him to proceed further only by asking the witness a question and following up that question with a specific reference to any claimed inconsistency in the deposition.

Petitioner announced that he would state the reasons for "objecting" to the court's ruling. The following colloquy then ensued (Pet. App. A32-A33):

> THE COURT: I am directing you not to state the basis of your objection. Whatever you have, as a matter of law, as a basis of your objection, you will be the beneficiary of. Now, we will just deter what I think is [an] irrational cross-examination process. So I have made my ruling.
>
> MR. FREEDMAN: I am afraid I have to give the basis for my objection.
>
> THE COURT: All right. You may disregard my direction. If you give the basis when I told you not to, I am going to send for the marshal and hold you in contempt.
>
> MR. FREEDMAN: You can send for the marshal right now, because I am going to give the basis for my objection.
>
> THE COURT: I am directing you, as an officer of this Court not to state the basis of your objection. Whatever basis you have, you will have the benefit of claiming it. And if you disregard that, I am going to hold you in contempt.

MR. FREEDMAN: What I have to say, I want to say, not only for Your Honor, but for the Appellate Court if there happens to be a review. I am going to state it.

THE COURT: Just wait a minute. We will take a five-minute recess. I will send for the marshal.

Following a brief recess, the court twice more ordered petitioner not to state the reasons for his disagreement with the ruling and admonished him that he would consider a violation of the order to be criminal contempt (Pet. App. A33). Petitioner stated that he considered it his "responsibility under the law" to give his reasons (*ibid.*). Petitioner then disregarded the judge's order and stated that there was a direct contradiction in Stalvey's statements; he read verbatim several questions and answers in the deposition—which were among those previously read into the record—to demonstrate that alleged conflict. When petitioner had finished, the court held him in contempt; the court later filed an opinion and the necessary certificate (Pet. App. A3-A19).

2. On November 9, 1976, petitioner was cross-examining Samuel F. Long, an operating engineer who had testified for the plaintiffs, about several experiences he had had with petitioner's client, a union. Petitioner marked Long's work record as an exhibit and began interrogating the witness about that document. The district court sustained an objection to this line of questioning, ruling that it was beyond the scope of direct; the court instructed petitioner to confine his cross-examination to the incidents brought out on direct examination. Petitioner excepted to the ruling (Pet. App. A50).[2]

[2]The exception was unnecessary. Fed. R. Civ. P. 46.

Petitioner disregarded the court's decision; he resumed questioning the witness about the work record (*ibid.*). Opposing counsel again objected, the court repeated its prior ruling, and petitioner began to make "offers of proof" consisting of verbatim readings of entries on Long's work record (*ibid.*). The court stated that the work record would be received in its entirety as an offer of proof and that further reading should be discontinued.

Petitioner continued to read from the work record. After opposing counsel again objected, the court ordered petitioner to note only the dates of the particular entries he desired to include in his offer of proof; the court once more told petitioner that the work record was itself an offer of proof (Pet. App. A51). Petitioner continued reading verbatim for more than an hour, despite numerous warnings from the court to cease (Pet. App. A24-A25, A51-A52).

When petitioner had finished, the court recessed the trial (Pet. App. A52). In an opinion filed the following day the court found petitioner in contempt for willfully disobeying its orders (*id.* at A20-A25). The court held that petitioner's deliberately obstreporous conduct was an effort to delay the trial by "endlessly reading into the record those matters which have *already* been precluded *and* which are already a matter of record" (*id.* at A24; emphasis in original).

3. The court of appeals affirmed (Pet. App. A27-A71). In a thorough opinion upon which we rely, it held that a lawyer must obey the court's orders even though it believes them to be incorrect, and that the remedy for incorrect decisions by a trial court is reversal on appeal rather than defiance.

ARGUMENT

Petitioner's conduct during the civil trial far overstepped the bounds of professional representation of a client's interests. We agree with petitioner that an attorney may make known his objections to a court's rulings and may seek to protect his client's rights; the court of appeals so held (Pet. App. A40). But once the court has ruled, an attorney, like all others present in the courtroom, must obey the court's ruling and seek his remedy on appeal. Petitioner did not do so.

"[A]ll orders and judgments of courts must be complied with promptly." *Maness* v. *Meyers*, 419 U.S. 449, 458. Any other practice would "frustrate and disrupt the progress of the trial with issues collateral to the central questions in ligitation." *Id.* at 459. See also *Geders* v. *United States*, 425 U.S. 80, 87; *Sacher* v. *United States*, 343 U.S. 1, 9.

There was no need for petitioner to comport himself as he did. His belief that he needed to state reasons for excepting to the court's order was wrong (Fed. R. Civ. P. 46), and there was no need to read aloud portions of a document that was already in the record as an offer of proof. But, beyond that, an attorney has no privilege to insist on proceeding according to his own view of proper procedure, and that is so even if the judge turns out to be wrong. In the courtroom someone must have the last word, and that word belongs to the judge rather than to the lawyers. Once the court here informed petitioner that he had preserved his points for appeal, his duty was to desist and obey the court's order.[3]

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[3]As the court of appeals pointed out (Pet. App. A40), moreover, it is never necessary to disobey a court's order to preserve a point for appeal. Petitioner relies on *In re McConnell*, 370 U.S. 230, and *Morrissey* v. *National Maritime Union of America*, 544 F. 2d 19 (C.A. 2), to support his claim that obedience to a trial court's order may result in waiver of a client's rights on appeal, but these cases do not support him. In *McConnell* this Court reversed the criminal contempt conviction of an attorney who, after being ordered not to make an offer of proof, threatened to but *did not* make the offer. *McConnell* stands for the proposition that an attorney's unfulfilled threat to violate the judge's order is not an obstruction of justice punishable as criminal contempt. In *Morrissey* the court of appeals found that counsel had waived an issue because of his failure to make an offer of proof concerning an absent witness's testimony. *Morrissey* is plainly inapposite, however, because the trial judge in that case never ordered counsel to refrain from making such an offer of proof; nor, for that matter, did the district court here bar petitioner's offer of proof. It ruled, instead, that petitioner already had made an offer of proof and need not read the written document aloud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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